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10/697,070	10/29/2003	Keith Alan Hankin	50277-2241	8121

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HICKMAN PALERMO TRUONG & BECKER/ORACLE
2055 GATEWAY PLACE
SUITE 550
SAN JOSE, CA 95110-1083

EXAMINER	
LIE, ANGELA M	

ART UNIT	PAPER NUMBER
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte KEITH ALAN HANKIN

Appeal 2009-004117
Application 10/697,070
Technology Center 2100

Decided: April 20, 2010

Before JAMES D. THOMAS, LANCE LEONARD BARRY, and CAROLYN D. THOMAS, *Administrative Patent Judges*.

J. THOMAS, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

In a paper filed on January 24, 2010, Appellant requests that we hear our decision in the opinion dated November 24, 2009, in which we affirmed

the Examiner's rejection of various claims under 35 U.S.C. § 102 and a separate rejection under 35 U.S.C. § 103. [1]

At the bottom of page 5 of our prior opinion, we made reference to what amounts to the Examiner's initial statement of the rejection under 35 U.S.C. § 102 and to corresponding responsive arguments of the Examiner directed to the Examiner's views as to the arguments presented in Brief. There, we also make special note that the Examiner addressed each of the major arguments presented by Appellant in the Brief. We concluded that "[t]aken as a whole, the Answer is persuasive of unpatentability."

The Request takes the erroneous position that the Board and Examiner erred by contradicting themselves such that the Examiner was flip-flopping between contradictory positions. The position is concluded at the top of page 5 of the Request that it is allegedly clear error to adopt and rely upon both positions. The Request is addressed to the Examiner's positions in the Answer which had gone unrebutted since no Reply Brief had been filed in this appeal. This argument should have been presented in a Reply Brief. In such a situation, we will not entertain it now since it was presented in an untimely manner.

New arguments in a request for rehearing will not be considered. *Cf. Pentax Corp. v. Robinson*, 135 F.3d 760, 762 (Fed. Cir. 1998) (citing cases supporting the proposition that issues not raised before the court are not addressed on rehearing); *Cooper v. Goldfarb*, 154 F.3d 1321, 1331 (Fed. Circ. 1998) (citing *Moller v. Harding*, 214 USPQ 730, 731 (BPAI 1982), *aff'd*, 714 F.2d 160 (Fed. Cir. 1983) (table)) ("A party cannot wait until after

[1] The above-noted panel only recently received this request for decision.

the Board has rendered an adverse decision and then present new arguments in a request for reconsideration.").

A statement is made at the top of page 5 of the Request for Hearing that "[t]he Board may be tempted to find . . . ." The allegation is made in the topic heading that the Board should not find "Sua Sponte" that the load balancing information inherently teaches space usage data. It appears to be a strawman argument, where any arguments of the Examiner's alleged improper reliance upon inherency should have been made in the Brief and/or Reply Brief, the latter of which was not filed.

Lastly, the Request does not recognize that we indicated at page 6 of the prior opinion that it was the Examiner's view that representative independent claim 1 did not expressly recite separate storage spaces to which first and second sets of data correspond. The Examiner made significant points at pages 11-13 of the Answer in the responsive arguments portion of it regarding the lack of express recitations of certain features argued not to be present in Chinta. From our perspective, representative independent claim 1 does not necessarily require separate first and second base usage data in separate first and second database servers. The mere recitation of a first set and second set etc. does not require an interpretation that they are separate or otherwise different. We also pointed out at page 6 of our prior decision that "the Examiner's reliance upon Chinta's Figure 23 to determine storage space as we noted in Finding of Fact 1 is interpreted to be clearly applicable to the plural application servers 108 A, 108 B with the common database 110 in Figures 2A-C."

In view of foregoing, Appellant's request for rehearing is granted to the extent that we have reviewed our findings, but is denied as to making any change therein.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

DENIED

Erc

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